Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1262

KEVIN FLOWERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Kevin Flowers respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit rendered the 15th day of January 1979, affirming the judgment of the United States District Court for the Southern District of New York (Lasker, D.J.), convicting the defendant of possession of a firearm without a license therefore (26 U.S.C. §§5845, 5861(D) and 5871).

OPINION BELOW

The United States Court of Appeals for the Second Circuit did not write a formal opinion, but rather, rendered a memorandum decision, which is annexed as an appendix to this petition, along with the order of affirmance.

JURISDICTION

The jurisdiction of this Court is predicated upon 28 U.S.C. §1254(i) and the Rules of the Supreme Court, Rule 22(2). The order of affirmance is dated January 15, 1979.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments of the United States Constitution, as well as 26 U.S.C. §§5845, 5861(D) and 5871, are involved herein.

QUESTIONS PRESENTED

1. Whether an accused who already has counsel representing him on a state charge, may be summarily taken into custody by federal agents on similar grounds, surreptitiously whisked out of the state court, and then questioned in the absence of his counsel concerning the very facts that caused his state arrest?

2. Whether a statement taken in the enforced absence of an accused's counsel may be used against him on the pretext that the questioning was in connection with a federal crime based upon the identical facts as his state arrest, and whether such statement may then be used against the accused as the main basis of his conviction in a federal trial?

3. Whether or not a *per se* rule should be adopted by this Court prohibiting the taking of a statement from an accused who has a lawyer representing him, unless such lawyer, after consulting with the accused, consents to his client giving a voluntary statement?

THE FACTUAL BACKGROUND

The petitioner herein was arrested by state authorities and charged with possession of a sawed-off shotgun in Bronx County, New York. He was in his early twenties, and had custody of a young child, born out of wedlock. His mother is employed by the IRS and two uncles are medical doctors and police officers respectively. The defendant himself, however, a male person of black ancestry, was not well-educated, and was not adjusting well to society.

About ten days after his arrest in Bronx County, the defendant came to court, *i.e.*, the state court, with his mother. He already had a lawyer representing him at that time.

Unknown to either his mother or the court, and probably unknown to his lawyer (since the lawyer was never called as a witness), two federal agents summarily arrested the defendant in the back of the courtroom where the prisoners are held, and whisked him away to the U.S. Courthouse in the lower part of Manhattan. During this interval, while he was being transported downtown from the Bronx, an incriminatory statement was obtained from the defendant-petitioner. This statement was deemed crucial to his later conviction on the federal charge, since the trial judge in this non-jury trial, indicated that the confession to the federal authorities was a major factor.

Flowers took the stand and stated that he had been coerced into making the statement and that he had asked for a lawyer. Moreover, he denied that his state lawyer ever gave him any

advice whatsoever about talking to the federal authorities and, consequently, this testimony was refuted only by one of the agents who alleged that he had spoken to the state lawyer, who indicated that he would not be representing Flowers in any federal case. This lawyer did not testify and, therefore, we only have a hearsay assertion from the mouth of an agent, as to what was said.

REASONS FOR GRANTING THE WRIT

I.

Since Flowers, a young black lad of limited education, was not given the benefit of advice from his retained state lawyer prior to federal agents seizing him in the prisoner area of the state court and whisking him downtown, the statement which petitioner gave to these officers should have been suppressed in all respects.

In the case at bar, Flowers already had a lawyer representing him in a state action charging him with possession of a sawed-off shotgun. On his second or third appearance in state court, while accompanied by his mother and his attorney, Flowers appeared on the state charge before the Criminal Court, Bronx County.

Flowers, while being held in the prisoner area of the courthouse, was suddenly arrested by two federal agents, who whisked him out of the building without the knowledge of his mother and, according to Flowers, without the knowledge of his lawyer, and took him downtown to the federal court.

The petitioner was questioned, however, in the enforced absence of his lawyer on the way down, and an important incriminating statement was obtained from him, which later proved to be his undoing at his trial.

Had this been a state matter, the statement would have been summarily suppressed (*People v. Hobson*, 39 N.Y. 2d 477, 384 N.Y.S. 2d 418).

We maintain that *Miranda v. Arizona*, 384 U.S. 436, implies a need for a similar *per se* rule in federal courts. *See Spano v. New York*, 360 U.S. 315 and *Massiah v. United States*, 377 U.S. 201.

In view of the foregoing, we submit that the statement obtained without counsel from this young black lad, should have been suppressed and that this Court, on constitutional basis, and in the exercise of its supervisory power over federal courts, should require suppression of any statements obtained in this manner.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

ORDER OF AFFIRMANCE AND MEMORANDUM DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of January, one thousand nine hundred and seventy-nine.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge

HONORABLE J. JOSEPH SMITH
Circuit Judge

HONORABLE INZER B. WYATT,
District Circuit Judge, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

KEVIN FLOWERS,

Defendant-Appellant.

78-1291

Appeal from the United States District Court for the Southern District of New York.

Order

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. Judge Lasker's finding that Flowers was not represented by counsel in connection with the federal gun charge at the time he was taken into custody is not clearly erroneous, and must be upheld. *See United States v. Boston,* 508 F.2d 1171, 1175 (2d Cir. 1974), *cert. denied,* 421 U.S. 1001 (1975). Accordingly, Flowers's confession was not obtained in the absence of counsel, and was properly admitted into evidence.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

s/ J. Joseph Smith
J. JOSEPH SMITH,
Circuit Judge

s/ Inzer B. Wyatt
INZER B. WYATT,
District Judge, sitting
by designation.

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UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the admissions that he made to federal agents should have been suppressed because they were obtained in violation of his right to counsel.

After a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of possession of an unregistered sawed-off shotgun in violation of 26 U.S.C. 5845, 5861(d), and 5871. He was sentenced to two years' imprisonment, but execution of the sentence was suspended, and he was placed on probation for five years.

1. The evidence established that on February 8, 1978, petitioner was arrested by New York City police officers for possession of a sawed-off shotgun and five live shotgun shells (Tr. 59-60, 176-178). On February 17, 1978, the state charges against petitioner were dismissed during a proceeding at which petitioner was present. At the

conclusion of the state proceedings, two agents of the Alcohol, Tobacco and Firearms Bureau who were present at the courthouse executed a federal warrant for petitioner's arrest (Tr. 14, 50; S. Tr. 19, 36-37).[1] One of the agents told the attorney who was representing petitioner in the state case that the agents had a federal warrant to arrest his client (Tr. 37-38, 53-54; S. Tr. 32, 43-45). The attorney asked for a copy of the warrant and left to speak with petitioner (Tr. 37-38). When he returned, the attorney informed the agents that he did not practice in the federal courts and that he would not be representing petitioner in the federal case (Tr. 38, 54; S. Tr. 44-45).[2] One of the agents asked the attorney whether they could speak to petitioner, and the attorney replied that he saw no problem with their doing so, that he was not representing petitioner on the federal charges, and that it was up to the petitioner to decide whether he was willing to talk to them (Tr. 38). The agents then arrested petitioner and advised him of his rights, including his right to counsel (Tr. 16, 51; S. Tr. 20, 37). Petitioner stated that he understood his rights (Tr. 17, 51; S. Tr. 20, 37). While the agents were driving petitioner across town, petitioner admitted to the agents that he had purchased the shotgun three years earlier for $55 (Tr. 22-23, 52; S. Tr. 23-24, 38). Later, petitioner read and signed a written waiver of his rights and then repeated the admission he had made to the agents in the car (Tr. 28-30; S. Tr. 26-28).

The district court reserved ruling on petitioner's motion to suppress these admissions until the completion of the trial testimony (Tr. 5). At the end of the relevant

[1]"S. Tr." refers to the transcript of the evidentiary hearing held on petitioner's motion to suppress the admissions.

[2]The agents' testimony on this point was corroborated by petitioner's mother, who testified (Tr. 82) that her son's attorney told her that the case "has been turned over to the federal * * * government" and that she would need to get a "federal lawyer."

testimony, the district judge found as a matter of fact that petitioner was not represented by counsel on the federal charge at the time of his admissions (Tr. 71). The court of appeals affirmed this finding (Pet. App. 2a).

2. The record does not support petitioner's allegation (Pet. 4) that his incriminating admissions were made during questioning "in the enforced absence of his lawyer." The record clearly shows that petitioner was not represented by counsel on the federal charge at the time the admissions were made. The attorney who had represented petitioner on the state charges stated unequivocally that he was not representing petitioner on the federal charges. Moreover, he raised no objection to the agents' questioning of petitioner outside his presence. Petitioner then made the admissions after he had been informed of his *Miranda* rights and had knowingly waived his right to have counsel present. Petitioner's reliance on *Massiah* v. *United States*, 377 U.S. 201 (1964), is thus misplaced. *Massiah*, and the more recent decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), involve situations where government agents deliberately elicited incriminating statements from a defendant who was represented by counsel without securing a waiver of the defendant's right to have his counsel present, and without informing counsel.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

[3]Moreover, we note that since petitioner had been arrested, but not yet indicted, the right to counsel had not yet attached. See *Kirby* v. *Illinois*, 406 U.S. 682 (1972).

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